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IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 282

ST. LOUIS AMUSEMENT COMPANY, ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., FANCHON & MARCO SERVICE CORPORATION, JAMES H. ARTHUR, DAVID G. ARTHUR, EDWARD B. ARTHUR, THOMAS G. ARTHUR, HARRY C. ARTHUR, III, EDWARD L. MURPHY, *Petitioners*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, AMERICAN ARBITRATION ASSOCIATION, HAROLD D. CONNOR, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Eighth Circuit, entered July 6, 1948, in the case of St. Louis Amusement Company et al. v. Paramount Film Distributing Corporation et al., No. 13502, affirming a judgment of

the District Court of the United States for the Eastern District of Missouri. (R. 325.)

SUMMARY STATEMENT OF THE MATTER.

Petitioner's sued respondents for treble damages and injunction for conspiracy in restraint of trade in violation of the antitrust laws. The complaint was filed October 25, 1944. (R. 2.) The action was dismissed on the ground that the restraint was authorized by a consent decree entered by the District Court for the Southern District of New York in *United States* v. *Paramount Pictures, Inc., et al.*, a case arising under the antitrust laws. That case was considered by this Court in an opinion delivered May 3, 1948. Petitioners here contended below that in so far as the decree was construed and used to bar an action by them for injunction and damages for violations of the anti-trust laws, it was void.

Petitioners are five corporations and one partnership, engaged in operating motion picture theatres in St. Louis. They operate first-run and subsequent run theatres at St. Louis, and depend on the distributor respondents for a necessary supply of pictures. (R. 2.)

Four of the respondents are engaged in the distribution of motion pictures. Two—the American Arbitration Association and respondent Connor, its agent in St. Louis—are engaged in adjudicating controversies among exhibitors relative to the terms and conditions upon which the distributors will license pictures to exhibitors, including petitioners, and in enforcing those adjudications. Three of the defendants in the District Court are exhibitors at St. Louis. Those defendants filed no motion, and therefore are not made respondents here. These three defendants and petitioners are independent exhibitors. They are in no way connected or affiliated with the respondent film companies.

The principal allegations of the complaint are (1) that the defendants are engaged in a conspiracy in restraint of trade; (2) as a part of which they have agreed to refuse to

sell pictures to petitioners except on terms and conditions established by the American Arbitration Association; and (3) that the defendants assert the concerted refusal is made legal by the consent decree. (R. 4, 7.)

These allegations are more fully stated as follows:

> 20. As a part of the combination and conspiracy American Arbitration Association, Harold D. Connor, Harry G. Erbs, and other officers and agents of American Arbitration Association who are unknown to plaintiffs, have arranged and agreed that they will receive complaints from exhibitors of motion pictures located in the several States, including St. Louis, Missouri, against and affecting other exhibitors, relative to the terms and conditions of contracts for motion pictures with the distributors and that they will make decisions and awards upon such complaints in accordance with a consent decree and rules of arbitration and appeal entered by the District Court of the United States for the Southern District of New York on November 20, 1940, in Civil Action No. 87-273, entitled *United States of America* v. *Paramount Pictures, Inc., et al.* (R. 5.)

The consent decree was entered November 20, 1940. It is printed in full at Record, page 28.

Practically the whole subject of the decree is the decision of controversies about clearances provided for in contracts for film between parties to that case and exhibitors who are not parties.

By the decree the American Arbitration Association is appointed "Administrator" of the system. (R. 52.) It is not a master in chancery or agent of the District Court.

As provided by the decree, the AAA has divided the country into thirty-one "judicial districts," and has established offices or courts in thirty-one principal cities, including St. Louis, for administering the system. By the decree the AAA is given the power to appoint and remove the "judges" and it has appointed a numerous adjudicating and clerical personnel for the trial of controversies described in the decree. An appellate court is established by the decree. (R. 5, 51, 53, 138.)

The AAA is given independent, exclusive, full and final jurisdiction of the controversies, there being no recourse at any stage to the District Court which entered the decree, as there would have been had the AAA the status of a master, referee or other agent of an equity court. (R. 134.)

That District Court has held that so far as it is concerned the AAA is wholly independent. On that principle, the District Court refused to entertain objections by an independent exhibitor to a decision of the AAA Appellate tribunal, on the ground that the jurisdiction of the court was "limited to a consideration of violations of the Sherman Anti-Trust Act by the defendants named as set forth in the pleadings, and remedies therefor, and can not be regarded as extending to an attempted proceeding in the District Court between an individual such as Sidney Lust Theatres and any of the defendants." (*United States* v. *Paramount Pictures, Inc., et al.*, Equity No. 87-273, unreported opinion of October 21, 1946.)

The decree creates new and pseudo causes of action for parties which are to be tried and enforced by the AAA courts and the defendants in the case in the New York District Court. Among such causes of action, all of which are unknown to the law, is included what may be called the Action of Clearance. The consent decree provides that

> Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration . . . (R. 35.)

Clearance is provided for in contracts for pictures, and is an obligation upon the film company not to make the picture available for future exhibition until the expiration of the clearance period.

The decree does not state any of the elements of the Action of Clearance. It states no rules or principles of decision. It names seven "factors" which the arbitrator-judge shall consider, namely—

> In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the im-

portance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres. (R. 35-36.)

It will be noted that while the arbitrator-judge is required to consider these factors, it is not indicated how they shall affect his decision.

The remedy and judgment to be awarded in a clearance case are stated in the decree as follows:

> The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree. (R. 36.)

The decree provides that an award or "judgment" against an exhibitor shall be enforced by refusal of the dis-

tributors to furnish pictures except in accordance with the judgment. Distributors who furnish pictures on any other terms violate the decree and are subject to punishment for contempt. (R. 147.) In this regard the decree states—

> No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such defendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award made and entered in such an arbitration proceeding. (R. 47-48.)

Inasmuch as in ninety percent or more of the actual cases, two or more of the film companies were subject to the "judgments", the enforcement was by their uniform and simultaneous refusal to deal with respondents. (R. 239.)

The arbitration system, its courts and personnel are financed by the film companies. Its existence depends upon their contributions. The decree provides:

> 8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Sections IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. (R. 54.)

The budget for the first year is fixed by the decree at not to exceed $490,000, "except with the consent of a majority of the distributor defendants." The budget for the succeeding years is $465,000. This amount may be increased by an additional contribution of $50,000, and still further increased by filing fees and penalties collected. (R. 52-53.)

Thus, during the first three years the distributors have contributed not less than $1,420,000.

On February 3, 1943, the Apollo Theatre Corporation and Joseph Litvag filed a complaint with the American Arbitration Association at St. Louis to procure better clearance in contracts between the Apollo Theatre and Fox, RKO, Paramount and Vitagraph. (R. 5-6, 93.) Petitioner St. Louis Amusement Company was one of the exhibitors whose clearance was attacked and who would be adversely affected.

The decree does not require that exhibitors to be adversely affected by an award shall appear or be made parties. It is only necessary that they be named in the complaint filed with the AAA. Exhibitors are given the right to appear if they wish, but upon condition that they consent. If they do not appear it makes no difference. Present or absent, the proceedings are had and a judgment is reached and enforced for or against them. In this regard the Rules of Arbitration and Appeals state—

> Any exhibitor or distributor named either in the Demand or in any list filed by any defending party and any other exhibitor or distributor whose business or property may be affected by an award in the proceeding may, at any time prior to commencement of the first hearing, intervene and thereby become a party to the proceeding by filing with the Clerk of the Tribunal a statement which shall set forth his interest as an intervenor in the proceeding and a submission as provided in subdivision 9 of Section XXII of the Decree and by paying a filing fee of $10.00 to the Clerk of the Tribunal. (R. 61.)

Petitioner St. Louis Amusement Company filed a Declaration of Intervention and was admitted as an intervenor. (R. 93.) On August 5, 1943, respondent Harry G. Erbs, the St. Louis AAA judge, reduced the clearance from fourteen to seven days in favor of the Apollo Theatre. To enforce this judgment, Fox, RKO, Paramount and Vitagraph have

uniformly refused to make contracts with St. Louis Amusement Company on other terms. (R. 5-6.)

On August 10, 1944, Adolph Rosecan filed a complaint with the AAA at St. Louis to procure better clearance terms for the Princess Theatre. The complaint stated that the existing clearances to petitioners' theatres were "unreasonable". (R. 6, 94.) Paramount, RKO, Warner, Fox and Loew's were named as parties defendant. Petitioners were not named in the complaint, but their theatres were listed and designated as "involved in the controversy" (R. 95) and as theatres of exhibitors "whose business or property complainant believes may be affected by an award in the arbitration proceeding" (R. 95-96); in other words, theatres for which clearances in film contracts were to be reduced in favor of complainant.

On August 24, 1944, petitioners offered for filing in that action with the AAA a motion that the proceedings be terminated, on the ground that the jurisdiction which the AAA was exercising was violative of the Constitution and the Sherman Antitrust Act. (R. 7.) The AAA refused to receive the document, or to entertain or act upon the objection. (R. 7.)

Petitioners then turned to the District Court which entered the decree, and in September, 1944, filed a motion in the District Court for the Southern District of New York to intervene in *United States* v. *Paramount Pictures, Inc., et al.*, Civil Action No. 87-273. The purpose of the proposed intervention was to induce the Court to require the AAA to desist from proceedings concerning contracts between petitioners and the film companies, on the ground that the decree and the proceedings in that regard were violative of the Constitution and the Sherman Antitrust Act. The motion was argued and peremptorily denied. (R. 133, 147.) A direct appeal to this Court based on the Expediting Act, 15 U. S. C. A. section 29, was dismissed for want of jurisdiction on October 8, 1945. (326 U. S. 680.)

Meantime, on October 25, 1944, petitioners instituted the present action in the District Court at St. Louis, alleging

the facts herein stated. The complaint prayed for an injunction and treble damages in the amount of $285,000. (R. 2, 16, 18.)

Motions to dismiss and for summary judgment were filed, on the ground that the action complained of was provided for and required by the consent decree. (R. 25, 159, 163, 168.) Petitioners replied that the decree with regard to arbitration as applied to them was void for the reasons stated.

On August 6, 1945, the District Court handed down an opinion dismissing the complaint on the general ground that the District Court at New York had not exceeded its authority in creating and vesting powers in the AAA. *St. Louis Amusement Co.* v. *Paramount*, 61 F. Supp. 854. (R. 245.) The dismissal was affirmed by the Circuit Court of Appeals in an opinion delivered July 6, 1948.

While the appeal was pending in the Circuit Court of Appeals, the authority for the arbitration system was terminated by the District Court at New York, but not as to the two proceedings in this case. On December 31, 1946, that Court entered a decree stating that—

> The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. (Record in this Court in *United States* v. *Paramount Pictures, Inc., et al.*, Nos. 79-86, October Term, 1947; 66 F. Supp. 359.)

Petitioners thus remain exposed to the danger and loss stated in their complaint, because the existing award against St. Louis Amusement Company reducing clearance in favor of the Apollo Theatre continues to be enforceable and unchangeable, and the proceedings now pending to re-

duce clearance in favor of the Princess Theatre to the detriment of petitioners may be continued to a conclusion.[1]

On appeal to this Court from the decree entered by the New York Court, this Court held that the District Court had no power to force parties to submit to arbitration, saying in that regard—

> . . . the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. (*United States* v. *Paramount et al.*, — U. S. — 68 S. Ct. 915, 938.)

JURISDICTION.

The jurisdiction of this Court is based on Title 28, Section 347 USCA (section 240 of the Judicial Code), authorizing review by certiorari of judgments of Circuit Courts of Appeal in civil cases.

THE QUESTIONS PRESENTED.

The questions arising on the facts in this case are:

1. Whether the creation by the District Court of the arbitration system was legislative?

2. If the creation of the arbitration system was not legislative, whether it was a delegation of the judicial power to the American Arbitration Association?

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[1] Although the District Court has granted no injunction against proceedings in the Princess Theatre arbitration case, the St. Louis arbitration office has taken no action since the filing of the complaint in the District Court on October 25, 1944.

3. Whether the uniform and simultaneous refusal of two or more of the respondent film companies to license pictures to petitioners in obedience to an award of the American Arbitration Association, is such conspiratorial action as is violative of the antitrust laws?

4. Whether the arbitration system is valid because it was contained in a consent decree and was agreed to by the law enforcing department and defendants in ostensible settlement of an antitrust case?

5. Whether the American Arbitration Association may lawfully resume and conclude the proceedings now pending against respondents except to enter an award dismissing the case?

REASONS FOR ALLOWANCE OF THE WRIT.

The writ should be granted and the judgment of the Circuit Court of Appeals should be reviewed and reversed by this Court because the questions are of great public importance, especially with regard to the administration of the antitrust laws and the preservation of the Constitutional tripartite division of Government in the United States. The importance of the case in this regard cannot be exaggerated. The case is of great importance to petitioners, to all other independent exhibitors of motion pictures, and, indeed, to all innocent parties in other fields who may be adversely affected by an unlawful restraint of trade. The District Court and the Circuit Court of Appeals have established a principle which will permit unlimited interference with the perfectly legal contracts of innocent parties, if guilty parties in an antitrust case engaged in the same business consent thereto, even though that interference has no tendency to dissipate the restraints. In other words, the judgments of the courts below are necessarily based on the proposition that an entire industry may be subjected to any system of regulation which the guilty parties and the law enforcing department may agree upon. And that regulation not only need not be limited to regulating the restrainers and monopolizers, nor be adequate to

neutralize and dissolve the unlawful power and combination, but instead may actually provide for a continuation and administration of the restraint and monopoly. That is the practical and legal effect of both judgments upholding the arbitration system in its application to petitioners. Though this basic proposition is not literally stated by those courts, it is by no means concealed or recondite in their written opinions. Thus, unless reversed, those opinions will be a source of much future mischief.

The writ should issue also because the opinions and judgments of the Circuit Court of Appeals and the District Court are in direct conflict with decisions of this Court; namely, *Paramount et al* v. *United States,* 282 U. S. 30, and *United States* v. *Paramount Pictures, Inc., et al.,* — U. S. —; 68 S. Ct. 915.

In the first case, in November 1930 this Court condemned as violative of the antitrust laws identically the same arbitration system. That was a suit brought against these respondents, dealing with an arbitration system to adjudicate disputes of exhibitors, operated by the same American Arbitration Association, in which the country was divided into numerous judicial districts in the same manner, with similar judicial tribunals in each district, and in which the judgments of the tribunals were enforced by the same collective refusal to furnish pictures. The parallel is complete.

In the second case, speaking of the very arbitration system in this case, which has been and will be applied to the petitioners, willy-nilly, this Court said—

> the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. (68 S. Ct. p. 938.)

Thus it appears that this arbitration system was conceived many years ago by respondents and their associates, was condemned by this Court in 1930, and was nevertheless resurrected by them in 1940 and became the decree of the district court in lieu of an effective remedy.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No.

ST. LOUIS AMUSEMENT COMPANY ET AL., *Petitioners,*

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION ET AL., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court is reported in 61 F. Supp. 854; R. 245.

The opinion of the Circuit Court of Appeals is reported at 168 F. 2d 988. It is printed at Record, page 315.

GROUNDS OF JURISDICTION.

In this case the Circuit Court of Appeals for the Eighth Circuit entered a judgment affirming a judgment of the District Court of the United States for the Eastern District of Missouri, granting motions to dismiss and for summary judgment in a case for injunction and treble damages under the Sherman Antitrust Act.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by writ of certiorari by section 240, amended, of the Judicial Code (Title 28, section 347 U. S. C. A.)

STATEMENT OF THE CASE.

A statement of the case has been made in the petition, under the heading "Summary Statement of the Matter," p. 2.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred—

1. In affirming the judgment of the District Court.

2. In holding that the consent decree was not void in its application to petitioners.

3. In holding, in effect, that the consent decree was not void in requiring the film companies to refuse to furnish pictures to petitioners except in accordance with an award of the St. Louis arbitration tribunal.

4. In holding, in effect, that the District Court for the Southern District of New York had jurisdiction to create the arbitration system, had jurisdiction to enact pseudo law to be administered by it, had jurisdiction to create and confer judicial power upon the AAA and its agents as inferior tribunals, or more correctly, as supreme and independent tribunals, to administer that pseudo law, and had jurisdiction to apply the arbitration system to petitioners.

5. In holding, in effect, that the consent decree in establishing the arbitration system and applying it to petitioners was not void, because it was approved by the District Court for the Southern District of New York, and because it was agreed to by the law enforcing department and defendants ostensibly in settlement of an antitrust case.

SUMMARY OF ARGUMENT.

The creation of the arbitration system was an unconstitutional enactment of pseudo law, an unconstitutional creation of judicial power, an unconstitutional establishment of inferior courts, and an unconstitutional vesting of judicial power in those courts.

The arbitration system was not a remedy for the restraint and monopoly. It had no semblance to a remedy, and had no tendency to dissipate the violation of law, especially in its application to petitioners.

The fact that the arbitration system was approved by the District Court for the Southern District of New York in a consent decree agreed to by the law enforcing department and defendants ostensibly in settlement of an antitrust case, does not make it valid.

ARGUMENT.

The Creation of the Arbitration System by the District Court for the Southern District of New York, Was an Unconstitutional Enactment of Pseudo Law, the Creation of Judicial Power, the Establishment of Inferior Courts, or, More Correctly, Supreme and Independent Courts, and the Vesting of Judicial Power in Those Courts.

By the Constitution all legislative powers are vested exclusively in Congress. (*Constitution*, Art. I, sec. 1.)

The creation of courts is also a legislative power, also vested exclusively in the Congress. (*Constitution*, Art. III, sec. 1.)

The arbitration system enacted new rules and new liabilities. It does not provide for investigating, declaring and enforcing liabilities on past facts under pre-existing laws. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

The consent decree created new causes of action to be tried, decided and enforced by the AAA courts and the respondents. It created what may be called the Action of Clearance.

That the District Court was exercising not a judicial but a legislative function, is almost expressly stated in the decree, (1) in the statement that the decree is not an "adjudication" that the allegations upon which it is based are true or that they constitute a violation of law; and (2) in the statement that "this decree relates solely to future conduct." (R. 30.)

The awards or "judgments" which the AAA was authorized to make show the legislative character of the decree. Those "judgments" were of four kinds: (1) cancellation of contracts; (2) penalty of $500; (3) directing parties to offer pictures; (4) fixing, reducing and eliminating clearance. (R. 32, 33, 34, 36.)

The action of the District Court in terminating the arbitration system, after it had been in use for more than six years, indicates that the District Court finally recognized the legislative and illegal character of the system. It said—

> We cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent . . . (66 F. Supp. 323, 333.)

Although the District Court thus recognized that parties could not be bound without their consent, nevertheless the system had been in full operation during those years without that limitation, especially with regard to the petitioners.

Evidently this Court was of the same view as to the legislative character of the system, for it stated—

> . . . the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. (*United States* v. *Paramount et al.*, — U. S. —; 68 S. Ct. 915, 938.)

The authority which the District Court has undertaken to vest in the AAA is an authority to perform judicial functions.

In re Saline County Subscription, 45 Mo. 52.
State v. *Hathaway*, 115 Mo. 36; 21 SW 1081.
Robey v. *Prince George's County*, 42 Md. 150; 48 Atl. 48.
34 *Corpus Juris*, p. 1178, sec. 2.

The District Court may not delegate judicial powers to an agency like the AAA, or even to its own clerk or to a master in chancery.

Meredith v. *People*, 84 Ill. 479 (Ill. Supreme Ct.)
Rouse v. *Thompson*, 228 Ill. 522 (Ill. Supreme Ct.)
12 *Corpus Juris*, p. 897, sec. 400.

It was beyond the jurisdiction of that court to disregard the Constitutional tripartite division of power.

Muskrat v. *United States*, 219 U. S. 346.
Taylor v. *Place*, 4 R. I. 324.
Vallely v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348.
United States v. *Walker*, 109 U. S. 258.
Ex parte Reed, 100 U. S. 13.
Elliott v. *Peirsol*, 1 Pet. 328.

It is not true that arbitration proceedings depend upon the consent of an adversely affected exhibitor. An exhibitor is permitted to appear, but present or absent the trial proceeds and a judgment is reached and enforced against him. Considering the fact that the arbitration system was conceived many years ago by the distributor respondents, was condemned by this Court in 1930 in *Paramount et al.* v. *United States*, 282 U. S. 30, and was nevertheless resurrected by them in 1940 and became the decree of the District Court in lieu of a remedy; and considering their possession and misuse of monopoly power and their proclivity to unlawful conduct in this field, of which the exhibitors have been the victims, any free consent by an exhibitor to arbitration proceedings is illusory. *United States* v. *Paramount*, 68 S. Ct. 915, 924.

The Fact That the Arbitration System Was Approved by the District Court for the Southern District of New York in a Consent Decree Agreed to by the Law Enforcing Department and Defendants Ostensibly in Settlement of an Antitrust Case, Does Not Make It Valid.

The District Court had jurisdiction only to "prevent and restrain" the violation of the antitrust laws stated in the complaint or shown in the evidence. Section 4 of the Sherman Anti-trust Act provides:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; . . . (26 Stat. 209.)

The District Court had no power to enter a decree which permitted the violation to continue, or which provided for the continuation and administration of the restraints, or which was without some tendency to dissipate the restraints.

United States v. *Standard Oil Co.*, 221 U. S. 1, 77-78.
United States v. *Bausch and Lomb*, 321 U. S. 706, 726.
United States v. *Crescent Amusement Co.*, 323 U. S. 173.

A decree under the antitrust laws may not invade the legislative field which belongs to Congress.

Hartford-Empire Co. v. *United States*, 323 U. S. 386.

The Federal Courts are courts of special and limited jurisdiction, and their action must be confined to the cases and parties over which the Constitution and statutes have authorized them to act.

Chisholm v. *Georgia*, 2 Dall. 432.
Mitchell v. *Clark*, 110 U. S. 633.
Rhode Island v. *Massachusetts*, 12 Pet. 657.

This jurisdiction may not be exceeded on the theory that a consent decree is a contract between the law enforcing de-

partment and defendants, and therefore may contain provisions limited only by their wishes and contractual capacity.

United States v. *Swift & Co.*, 286 U. S. 106.
United States v. *Socony-Vacuum Oil Co.*, 210 U. S. 150, 225.
United States v. *Dickson et al.*, 15 Pet. 141.

The decree did not touch the restraint and monopoly. It did not forbid the doing of the acts charged. It did not dissolve the combination. It did not neutralize the unlawful power of the defendants. It had no tendency in that regard.

The arbitration system was not a remedy for the restraint and monopoly. It had no semblance to a remedy, and had no tendency to dissipate the violation of law, especially in its application to petitioners.

The complaint in the case in which the decree was entered charged three principal means of effecting the restraint and monopoly: (1) concerted refusal to supply pictures to independent exhibitors, except upon terms concertedly established by the defendants; (2) the acquisition of theatres; and (3) divisions of territory among the defendants for exhibition of pictures. (R. 185-195, 200, 217, 221, 222, 229, 230, 231).

Independent exhibitors like petitioners are the conspicuous victims of the conspiracy stated in that complaint. The great burden of the complaint was a recitation of the injuries and restraints imposed on them. Amongst many restrictive practices which are stated is included a charge of concertedly fixing and enforcing terms and conditions as to clearance.

As to clearance, the complaint in that case alleges, using the synonymous term "protection":

> 116. In about 1930, after the producer-exhibitor defendants had substantially completed their theatre acquisition programs, they made a concerted effort to

establish uniform zoning and protection plans throughout the United States through the Film Boards of Trade. It was the purpose of these plans to establish in each exhibition territory a uniform plan of zoning and protection which would give a definite status to each theatre in the territory and which would prevent any distributor from dealing with such theatre with respect to run, zoning, or protection, on any terms other than those provided for in the plan. (R. 210.)

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117. In 1932 the United States District Court for the District of Nebraska held that the Uniform Zoning and Protection Plan for the Omaha Distribution Territory was an agreement between distributors which restrained trade in violation of the Sherman Act. After the illegality of these uniform zoning and protection plans became apparent in 1932, the distributors, refrained from employing any express agreements with each other with respect to uniform protection and zoning. (R. 211.)

There was no charge that the victims of the monopoly were the beneficiaries of improper clearances as amongst themselves. The charge was that the monopolizing film companies had unlawfully postponed the use of films by the independent exhibitors for the benefit of the theatres of the film companies.

The decree did not touch this evil. It merely provided a system by which, and tribunals before which, the injured exhibitors might quarrel among themselves about which of them should have what the combined film companies should choose to let them have.

Originally the provisions of the decree were of five classes, excluding introductory matter: namely, (1) a provision requiring the trade showing of pictures before licensing them for use, (R. 30-31); (2) a provision against requiring exhibitors to take shorts or other pictures with features (R. 31); (3) numerous provisions creating and stating the arbitration system, (R. 32-41, 47-48, 51-55, 59-72; 66 F. Supp. 331-332); (4) provisions relative to sup-

plying information to the Department of Justice (R. 42, 49-50); (5) provisions limiting the application of the arbitration system, and other provisions for suspension of provisions, and for postponing the right of the Government to seek an end to the restraint and monopoly by dissolution, all in favor of the defendants. (R. 43-46, 50-51; 66 F. Supp. 332-333).

By the terms of the decree, the trade showing and block booking provisions became inoperative as of September 1, 1942. (R. 30-31.) Since that time nothing has remained of the decree but the rule against forcing shorts, westerns and foreign pictures, and the arbitration system. In its administration the arbitration has been used to cut down the perfectly legal and short clearance which petitioner St. Louis Amusement Company was able to procure. It proposes to take like action in another case affecting all the petitioners.

The total inefficacy of that decree has been virtually affirmed by the Department of Justice, in an application for modification of the decree, in which the Department declared that

> Said decree is now inadequate to perform its intended function of restraining the violations of law alleged in the complaint and conforming the operation of the decree defendants to the requirements of the Sherman Act. (R. 19.)

Clearances committed to the pseudo jurisdiction of the AAA were not required to be tested by the standards of the antitrust laws, and in the proceedings in this case concerning the Apollo and Princess Theatres no such standards have been used. Now, however, in its approval of an arbitration system for the future based on consent, the District Court seems to indicate a requirement that the standards of the antitrust laws shall be applied. (66 F. Supp. 342-343.)

Under the arbitration system it was impossible for petitioners to determine what was a reasonable clearance. It

was impossible for them to make any contract for pictures however free from illegality, which could not later be pulled up by the roots by an arbitrator.

The same kind of trade regulation was condemned in *Schechter* v. *United States,* 295 U. S. 495, 541, 542, 553, in which the power in a government agency to make codes of "fair competition" was held to be an unconstitutional delegation of legislative functions.

See also

United States v. *Cohen Grocery Co.,* 255 U. S. 81.
Cline v. *Frink Dairy Co.,* 274 U. S. 445, 457.

How entirely remote was the arbitration system from a remedy for restraint of trade, monopoly or other actionable wrong, is disclosed in a brief filed by the respondents, in which they state that the purpose and practice of the arbitration judges was to "review the business judgment" of the parties to film contracts. The brief asserts—

> The arbitrators by the decree have been permitted to *review the business judgment of distributors and exhibitors* and to determine whether or not the clearance granted in particular cases was too long in point of time or too extensive in area, after weighing the several factors set forth in Section VIII. We will contend that it is apparent from the decisions that the members of the appeal board and the arbitrators have been assiduous in performing their duties and have provided adequate relief *wherever their judgment differed from the business judgment of the distributors and exhibitors which they reviewed.* (R. 243.) (Italics ours.)

The arbitration tribunals, judges and personnel were controlled by and subservient to the respondents. As has been shown, the system depended upon them for the financial means of subsistence, and the fines and fees collected accrued to the AAA. Where a judicial officer has an interest in the fines imposed, the proceeding is unconstitutional.

Tumey v. *Ohio,* 273 U. S. 510.

CONCLUSION.

It follows that the decree is void as a basis for the arbitration proceedings against petitioners, and that it ought not to have been accepted as a defense in the action in the District Court at St. Louis for injunction and damages.

It follows also that the American Arbitration Association may not lawfully resume and conclude the proceedings now pending against petitioners, as it shall be free to do unless the judgment of the Circuit Court of Appeals shall be reversed. In the light of the statement of the New York District Court that the arbitration system may be continued "insofar as may be necessary to conclude arbitration proceedings now pending", there is every reason to believe that the proceedings against petitioners will be resumed and will end in concerted, injurious action against them.

Petitioners have been forced to submit to the arbitration system, and the consent decree has been used to deprive them of remedies afforded by Congress, despite the statement of this Court in *United States* v. *Paramount et al.*, 68 S. Ct. 915, 938, that "the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress". Petitioners have been deprived of the right to have their contracts tested by the law of the land, of the right to make perfectly legal contracts for undisputedly perfectly reasonable, non-restrictive, non-monopolistic clearances. They will be further deprived of that right in pending proceedings before the St. Louis AAA "court". They have been denied a remedy by the District Court at St. Louis, again by the District Court at New York, and again by the Circuit Court of Appeals. Unless the judgment of the Circuit Court of Appeals shall be reversed by this Court, they will be totally and finally foreclosed.

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September 1948.